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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ANTHONY C. KOVIC,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

WHETHER FIFTH AMENDMENT DUE PROCESS OF LAW REQUIRES THAT A CRIMINAL DEFENDANT BE PERMITTED TO DENY TESTIMONIALLY HIS PARTICIPATION IN CONDUCT FORMING THE BASIS OF A CRIMINAL VIOLATION WITHOUT RISK OF CROSS-EXAMINATION AS TO OTHER CRIMES AND WRONGS CHARGED IN A SEPARATE AND PENDING INDICTMENT.

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PRAYER

The Petitioner, Anthony C. Kovic, respectfully prays that a Writ of Certiorari issue to review the Judgment and Order entered by the United States Court of Appeals for the Seventh Circuit on July 21,

1982, affirming Petitioner's conviction in the United States District Court for the Northern District of Illinois, Eastern Division; and the Order entered by the United States Court of Appeals for the Seventh Circuit on August 17, 1982 denying the Petition for Rehearing herein.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit, not yet reported, affirming the judgment of conviction below, is attached hereto and appears as Appendix A. The Order of the United States Court of Appeals for the Seventh Circuit denying the Petition for Rehearing herein, is attached hereto and appears as Appendix B.

STATEMENT OF JURISDICTION

The Petitioner, Anthony C. Kovic, appealed his conviction in the United States District Court for the Northern District of Illinois, Eastern Division to the United States Court of Appeals for the Seventh Circuit. On July 21, 1982, the United States Court of Appeals for the Seventh Circuit affirmed the judgment of conviction. A timely Petition for Rehearing was denied by the Seventh Circuit Court of Appeals on August 17, 1982.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. 1254(1) and Rule 17(1)(a) and (c) of the Rules of this Court.

This Petition for a Writ of Certiorari has been filed within the time permitted by law after the denial of the Motion for Rehearing by the Seventh Circuit Court of Appeals.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V of the Constitution of the United States provides:

> No person shall be held to answer for a capital of otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment VI of the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted

> with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATUTORY PROVISION INVOLVED

Title 18, Section 3481, United States Code, states:

> In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts in inquiry of any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

STATEMENT OF THE CASE

Petitioner, Anthony C. Kovic, was charged in twenty-nine counts of a thirty-one count Indictment with the commission of the following offenses:

1. Knowingly and wilfully having used the mails in furtherance of a scheme and artifice to defraud in violation of Title 18, U.S.C., Section 1341 (Counts One through Ten and Twelve through Twenty-seven).

2. Knowingly and wilfully affecting and attempting to affect commerce and the movement of articles and commodities in commerce by extortion under color of official right in violation of Title 18, U.S.C., Section 1951 (Counts Eleven and Twenty-eight).

3. Having engaged together with others known and unknown to the grand jury in a conspiracy to violate Title 18, U.S.C., Section 1962(c) and to have participated in the conduct of an enterprise defined by Title 18, U.S.C., Section 1961(4) through a pattern of racketeering activities including the use of the United States Mails in furtherance of a scheme and artifice to

defraud (Counts Twenty-nine and Thirty).

After a trial by jury, on November 26, 1980, the Defendant was found guilty as to Counts One through Four, Six and Seven, and Eight through Thirty inclusive.[1/] Judgment was entered on the verdict; the Defendant was committed to the custody of the Attorney General for a period of five years on each of Counts One through Four, Eight through Ten and Twelve through Twenty-seven; for a term of ten years on each of Counts Eleven and Twenty-eight; and for a term of twelve years on each of Counts Twenty-nine and Thirty, all terms to run concurrently with each other. In addition, the Defendant was fined the sum of One Thousand Dollars on each of Counts One through Four, Eight through Ten and Twelve through Twenty-seven; Ten Thousand Dollars on each of Counts Eleven and Twenty-eight;

1/ The Defendant was not named in Counts Five and Thirty-one.

and Twenty-five Thousand Dollars on each of Counts Twenty-nine and Thirty, all fines to be cumulative for a total amount of Ninety-three Thousand Dollars.

The Seventh Circuit Court of Appeals entered an Order on July 21, 1981, affirming the conviction and judgment of the District Court; and on August 17, 1982, the Court of Appeals denied a Petition for Rehearing.

On Mr. Kovic's motion, the Court of Appeals issued its Order staying the mandate and gave the Petitioner until September 23, 1982 to file his Petition for Writ of Certiorari in this Honorable Court.

The Defendant, Anthony C. Kovic, was, during the relevant period, the Chief of the Electronics and Motor Maintenance Division of the Chicago Police Department. In this capacity he was a civilian employee of the police department. The division headed by the Defendant was responsible for the

purchase and maintenance of all electronic equipment and squad cars for the Chicago Police Department. Defendant was charged and convicted of participating in three separate schemes to defraud the City of Chicago.

The first scheme involved Motorola, Inc., a major vendor of electronic equipment to the Chicago Police Department. Three former Motorola employees testified that the Defendant had asked them to obtain two large screen television sets worth Three Thousand Dollars each for himself and for a friend. There was testimony by a television distributor that one of the sets was delivered to the Defendant's residence and left on the front porch. There was testimony that one of the Motorola employees submitted a fictitious billing to Motorola in the name of a corporation which he had formed for delivering subcontracted materials to Motorola for use by the Chicago Police

Department. Motorola paid these invoices and in turn included the charges in its billing to the Chicago Police Department.

The second scheme involved El-En, Inc. and its parent corporation, Grand Spaulding, an automobile vendor. There was testimony to the effect that the Defendant approached Grand Spaulding personnel and demanded money. There was evidence that over a six month period, the Defendant falsified work orders to facilitate the payment of approximately Forty-five Hundred Dollars in additional funds to Grand Spaulding. There was addition testimony that Forty-five Hundred Dollars in cash was paid to the Defendant.

The third scheme involved Trancor, Inc., a transmission repair business owned and operated by Joseph Smith. Smith testified as to certain meetings and conversations with the Defendant and the payment of slightly less than Sixty-two Thousand Dollars

to the Defendant over a twenty-five month period. Smith explained that his contract with the City was modified to reduce a forty percent discount to thirty percent, thus creating a ten percent difference for use in making payments to the Defendant.

At the time trial was held, the Defendant was under Indictment in a separate proceeding assigned to a difference District Court Judge. That Indictment charged the Defendant with precisely the same type of scheme for which he was tried and convicted in this case.

The scheme in the second Indictment involved an automotive repair business known as Mar-Lin. In that Indictment the Defendant was charged with conspiring with others to extort kickbacks from the owner of Mar-Lin, a Mr. Richard Nawrocki. That cause was tried subsequent to the Defendant's conviction here.

Before the defense rested, the following colloquy occurred between the court and one of the defense counsel:

> The record may show that you expect to tender such evidence, that the witness would so testify -- is that right?
>
> MR. MACKAY: Yes. I would like to make an offer of proof.
>
> THR COURT: I will let you make an offer of proof. You can do that out of the presence of the jury.
>
> MR. MACKAY: Yes. I would like to do that.
>
> THE COURT: Yes. All right. I will be back in two minutes.
>
> MR. MACKAY: Well, your Honor?
>
> THE COURT: Yes? What else do you have?
>
> MR. MACKAY: There is one other matter that I would like to discuss. That is that we have only a few witnesses and we have not yet decided whether or not the defendant will testify on his own behalf. The reason we have not is because of the representations by the government that if the defendant were to testify they would attempt to cross-examine him as to transactions not involved in this indictment;

MR. MACKAY: So, would it then be the Court's ruling that the Court would allow the government to inquire into those matters on cross-examination if the defendant --

THE COURT: Well, let me ask the government, does the government propose to make that type of cross-examination?

MR. TARUN: Yes, Judge. As you know, we tendered to the Court an in camera statement --

THE COURT: I know that, I know that. Well, I certainly would think that they would have that right. I mean, I would think certainly that that evidence would be -- well, what is your position?

MR. MACKAY: Your Honor, it is our position that if the probative --

THE COURT: I wouldn't permit them to put that in in their case-in-chief, that's all I have done so far.

MR. MACKAY: That is correct.

THE COURT: But on the question of cross-examination the whole world of testimony is pretty much opened up. If you put your client on the stand, I mean, he can certainly be cross-examined. I don't have any problem about that.

MR. MACKAY: So, the Court would allow the Government to --

THE COURT: That is right.

MR. MACKAY: -- to inquire into that on cross examination?

THE COURT: I would. That is right.

As a consequence, the Defendant did not testify in his own behalf. Defendant never disputed that there was indeed a scheme to defraud. His position throughout the trial, which was disclosed in defense counsel's opening statement, was that the Defendant was not a participant in that scheme.

Prior to trial the District Court had granted the Defendant's Motion In Limine and precluded the Government from introducing, in its case-in-chief, any evidence of similar crimes or wrongs (i.e., the Mar-Lin scheme alleged in the separate and pending Indictment).

On appeal, the Seventh Circuit Court of

Appeals concluded that there was no improper penalization of Defendant's right to speak in his own behalf.

REASONS FOR GRANTING THE WRIT

DUE PROCESS OF LAW REQUIRES THAT A CRIMINAL DEFENDANT BE PERMITTED TO DENY TESTIMONIALLY HIS PARTICIPATION IN CONDUCT FORMING THE BASIS OF A CRIMINAL VIOLATION WITHOUT RISK OF CROSS-EXAMINATION AS TO OTHER CRIMES AND WRONGS CHARGED IN A SEPARATE AND PENDING INDICTMENT

The parameters of substantive due process vis-a-vis the permissible scope of cross-examination of a criminal defendant concerning alleged other crimes and wrongs charged in a separate and pending Indictment are unsettled. Rule 404(b) of the Federal Rules of Evidence is of little assistance in disposing of the issue. The Rule does not deal with the underlying question as to what extent the danger of undue prejudice must outweigh the probative value of the evidence or the availability

of alternative evidence. Nor does it even suggestively address the substantive due process issue which is paramount to these other considerations.

Had the Defendant elected to offer testimony denying his participation in the acts charged in the case on trial (thereby not raising issues of intent), he would have been required to relinquish his Fifth Amendment privilege as to the charges contained in the separate and pending Indictment. Putting a Defendant to that choice where he simply wishes to deny his participation in certain conduct is not only unnecessary; it is not a permissible impeachment device. The probity of such evidence is, at most, questionable. It is fairly apparent that evidence of these alleged other crimes and wrongs was not necessary to persuade the jury of the Defendant's guilt since none of this evidence was placed before them. Yet, the Defendant

was placed at substantial risk of undue prejudice in the minds of the jury if he testimonially denied his participation in the acts charges in the case on trial.

It is essential that his Court expressly define the parameters of a criminal defendant's right to testify on his own behalf. In Harris v. New York, 401 U.S. 222 (1971) this Court acknowledged a criminal defendant's privilege to testify on his own behalf. In what this Court termed "a matter of constitutional right" in Brooks v. Tennessee, 406 U.S. 605, 612 (1972), this Court referred to a Defendant's right to testify as an important tactical decision. In Faretta v. California, 422 U.S. 806, 819 n.15 (1975) this Court referred to a criminal defendant's right to testify as being "essential to due process of law . . .". The Seventh Circuit has expressly held that a criminal defendant has a constitutional right to testify on his

own behalf under the Fifth, Sixth and Fourteenth Amendments. Alicea v. Gagnon, 675 F.2d 913 (7th Cir., 1982).

Although a Defendant's right to present relevant and competent evidence is qualified by the government's competing interests in testing his veracity through cross-examination, that interest must be substantial to overcome the Defendant's free and unfettered exercise of that right. Hughes v. Matthews, 576 F.2d 1250, 1258 (7th Cir.), cert dismissed, 439 U.S. 801 and Chambers v. Mississippi, 410 U.S. 284, 294 (1973). Where, as here, constitutional rights directly affecting the ascertainment of guilt are involved, rules of evidence should not be mechanistically applied to defeat the ends of justice. Parisie v. Grear, 671 F.2d 1011 (7th Cir., 1982).

Where, as here, a Defendant wishes simply to deny that he participated in con-

duct forming the basis of a conspiracy and a scheme, the government's interest in testing his veracity during cross-examination is not sufficient to permit questioning concerning other crimes and wrongs charged in a separate and pending Indictment. A Defendant's right to testify, under those circumstances, becomes a hollow and meaningless one. Substantive due process demands more.

CONCLUSION

For the reasons stated, the Petitioner respectfully prays that this Honorable Court issue a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Seventh Circuit.

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